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SPECIAL RECENT DEVELOPMENT

UNITED STATES V. SIOUX NATION: POLITICAL QUESTIONS, MORAL IMPERATIVE, AND THE NATIONAL HONOR†

Stephen Cosby Hanson*

In 1877, Congress enacted a statute¹ that provided for the relinquishment by the Sioux Nation² of some 7.5 million acres from the Great Sioux Reservation, including one of the richest gold fields in the world in the Black Hills³ of South Dakota and Wyoming. The 1877 Act was passed by Congress without the consent of the Sioux⁴ as specifically required under article 12 of the Fort Laramie Treaty of 1868,⁵ which stipulated: "No treaty for the cession of any part of the reservation . . . shall be of any validity or force as against said Indians, unless executed and signed by at least three-fourths of all the adult male Indians."⁶

Furthermore, the 1877 Act unilaterally terminated Sioux hunting rights on an additional 50 million acres⁷ and carved three

† Reprinted with permission of University of West Los Angeles Law Review, © 1981. Minor differences in this article will be apparent.—*Ed.*

* J.D., 1981, University of West Los Angeles.

1. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254-64.

2. Consisting in part of the Sioux tribes of the Rosebud Indian Reservation, South Dakota; the Standing Rock Indian Reservation, North and South Dakota; the Pine Ridge Indian Reservation, South Dakota; the Crow Creek Indian Reservation, South Dakota; the Lower Brule Indian Reservation, South Dakota; the Cheyenne River Reservation, South Dakota; the Santee Indian Reservation, Nebraska; and the Fort Peck Indian Reservation, Montana.

3. For a description of the wealth of natural resources in the Black Hills, *see, e.g.*, *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151, 159, 234-35, 264-66, 304-57 (1974). *See also* 1 BLACK HILLS MIN. ATLAS, U.S. DEPT OF INTERIOR, BUREAU OF MINES (July, 1954); J. Aase, F. Steece, "Minerals In the Economy of South Dakota," U.S. DEPT OF INTERIOR, BUREAU OF MINES (1979) (pamphlet).

4. *Sioux Nation v. United States*, 601 F.2d 1157, 1161 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980); *United States v. Sioux Nation*, 207 Ct. Cl. 234, 238, *cert. denied*, 423 U.S. 1016 (1975); *Sioux Tribe v. United States*, 97 Ct. Cl. 613, 650 (1942), *cert. denied*, 318 U.S. 789 (1943); 33 Ind. Cl. Comm'n at 362.

5. 15 Stat. 635.

6. *Id.* art. 12.

7. Articles 11 and 16 of the 1868 Treaty, 15 Stat. 635, had guaranteed to the Sioux the right to hunt on certain nonreservation lands and unceded Indian territory. Under article 11, the Sioux agreed "that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River. . . ."

rights-of-way through the remaining reservation.⁸ It is noteworthy that these hunting rights, guaranteed by the 1868 treaty, had been conditioned on the continuing existence of the buffalo "in such numbers as to justify the chase."⁹ Official abrogation of these hunting rights was a mere formality, as the United States encouraged the extermination of the buffalo,¹⁰ just as some had advocated the extermination of the Indian.¹¹

The 1877 Act was in part the result of unsuccessful negotiations with the Sioux by a commission appointed by President Grant, at the request of Congress, to obtain the cession of the Black Hills.¹² When the commission returned to Washington, it submitted a report in which it urged, "The least we can do is to repay these friendly Indians honestly for the full value of the property which was taken . . . and redress some of the wrongs which furnish the darkest page of our history."¹³

Instead of paying just compensation for the Black Hills as the fifth amendment requires,¹⁴ Congress promised to feed and clothe the Sioux, "until the Indians are able to support themselves."¹⁵ This, too, was no unqualified pledge; the condi-

Article 16 provides that "[T]he United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same. . . ." The article 16 territory consisted of about 25 million acres, including some of the best Sioux hunting grounds in the Powder River Valley in Wyoming and Montana. Article 11 lands amounted to another 25 million acres, approximately, so that in all, the Sioux possessed rights to some 50 million acres of land outside their permanent reservation. *See* 97 Ct. Cl. 627-28. *See also* Brief for Sioux Nation at 14-17, notes 10 and 12, *United States v. Sioux Nation*, 448 U.S. 371 (1980).

8. Article 2 of the Act of 1877 created the right of the United States to construct three wagon roads.

9. 15 Stat. 635, art. 11.

10. R. DRINNON, *FACING WEST* 330 (1980); W. Hornaday, "The Extermination of the American Bison in Wyoming and Montana," 496-501 U.S. NAT'L MUSEUM, ANN. REP. (1887) (pub. 1889).

11. G. HEBARD & E. BRINSTOOL, *THE BOZEMAN TRAIL* 129 (1922). The origin of the phrase, "The only good Indian is a dead Indian," is traced to General Phillip H. Sheridan in 6 E. ELLIS, *THE HISTORY OF OUR COUNTRY* 1483 (1900). Henry Clay, while a member of John Quincy Adams's Cabinet, stated that the Indians were not "as a race, worth preserving." 7 C. ADAMS, *MEMOIRS OF JOHN QUINCY ADAMS* 90 (1875). *See also* S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 18 (1876).

12. 4 CONG. REC., 44th Cong., 1st Sess. S 1796 (1876).

13. S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 16 (1876).

14. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST., amend. V (1791).

15. Article 5, Act of Feb. 28, 1877, 19 Stat. 254.

tions imposed put the Sioux at the mercy of the government.¹⁶ For these wrongs, the Sioux have suffered greatly, as have other Indian tribes forcibly removed¹⁷ from lands they had occupied for hundreds, and for some tribes, thousands of years.¹⁸ The Sioux lawsuit over the taking of the sacred Black Hills vividly demonstrates how long and difficult the road to justice has been for Indians. For the Sioux, it has required four special acts of Congress,¹⁹ more than ten million dollars in attorneys' fees,²⁰ and fifty-seven years in court.²¹

The *National Law Journal* said: "Indian law attorneys agree that the Sioux case is in a class by itself."²² In terms of monetary damages, *United States v. Sioux Nation*²³ is by far the largest judgment in the 32-year history of the Indian Claims Commis-

16. *Id.* This "promise" was subject to three additional limiting conditions contained in article 5 of the Act of 1877:

(i) rations would be issued only "upon full compliance with each and every obligation" imposed upon the Sioux by the 1877 Act;

(ii) "whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school"; and

(iii) "[w]henever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor (the aged, sick and infirm excepted);"

17. Indian "removal" is a term descriptive of a period in the nation's history occurring between 1789 and 1850. See text accompanying notes 63-69 *infra*.

18. There is some disagreement as to the length of time the Indians have inhabited North America. The most generally accepted theory is that the American Indians traveled from Asia across the Bering ice bridge some 8,000 to 28,000 years ago. D. HOPKINS, *THE BERING LAND BRIDGE* 373 (1967). Hopi and Zuni ancestors inhabited the Southwest at least 3,000 years ago. J. GOODMAN, *AMERICAN GENESIS* 196 (1980). The Sioux may have occupied the Black Hills as soon as 150 years before 1877. H. HOOVER, *THE SIOUX* viii (1979) [hereinafter cited as HOOVER].

19. (1) Act of June 3, 1920, 41 Stat. 738 (waiver of sovereign immunity and grant of jurisdiction to Court of Claims); (2) Indian Claims Commission Act of 1946, 60 Stat. 1049 (new forum for all tribal grievances); (3) Act of Oct. 27, 1974, 88 Stat. 1499 (offsets denied for "food, rations or provisions"); (4) Act of Mar. 13, 1978, 92 Stat. 153 (*de novo* review, without regard to defense of *res judicata* or collateral estoppel).

20. These fees were, of course, on a contingency basis. 25 U.S.C. § 70n (1976) provides for fees up to 10 percent of any award obtained. Attorneys for the Sioux filed for their fees—10 percent of \$105 million—in October, 1980. Rupert, *Sioux Tribe's Lawyer Just Won't Quit*, *AMERICAN LAWYER* (Dec. 1980), at 15, col. 1 [hereinafter cited as Rupert].

21. Measured from May 7, 1923, when the Sioux first filed in the Court of Claims, pursuant to the 1920 Act (*supra* note 14).

22. Lewin, *The Ruling That Took 23 Years*, *NATIONAL LAW J.* (Aug. 20, 1979), at 17, col. 1 [hereinafter cited as Lewin].

23. *United States v. Sioux Nation*, 448 U.S. 371 (1980).

sion.²⁴ On June 30, 1980, the United States Supreme Court affirmed the \$105 million award, accepting the contention of the Sioux that the 1877 Act effected a fifth amendment taking of the Black Hills without just compensation.²⁵ The holding may establish precedents of greater and more positive consequence for Indian tribes than the Sioux victory over Custer at the battle of the Little Big Horn, in 1876, which was another reason Congress enacted the 1877 Act.²⁶

There was never a question that the Sioux had been grievously wronged. The problem of the courts has been the "lack of satisfactory criteria for judicial determination." Such a dilemma, as faced by the Court in *Coleman v. Miller*,²⁷ is the hallmark of nonjusticiability. Indian affairs have always been highly political, and the courts are not empowered to decide political or moral questions.²⁸

24. The Indian Claims Commission was disbanded at the end of fiscal year 1978. 25 U.S.C. § 70v (1976). See UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT (1978). The largest previous awards include Kiowa, Comanche & Apache Tribes v. United States, 34 Ind. Cl. Comm. 263 (1974) (compromise agreement of \$35,060,000 for taking of aboriginal land); Thompson v. United States, 13 Ind. Cl. Comm. 513, 541-43 (1964) (\$29,100,000 compromise agreement for taking aboriginal land in California). Yet even the Sioux award is dwarfed by the Alaskan Native Claims Settlement Act [see 43 U.S.C. §§ 1605(a), 1086, 1611, 1612 (Supp. IV, 1974)] which totals \$962.5 million. The Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721, signed by President Carter, Oct. 10, 1980, totaling \$82.5 million. Both claims were settled out of court, and involved aboriginal lands unrecognized by federal treaty or act.

25. 448 U.S. 371, 423-24 (1980).

26. Lt. Col. George Armstrong Custer led an expeditionary force into the Black Hills in July, 1874, in violation of the 1868 Treaty with the Sioux, for the purpose of determining the value of the region. Subsequently, the army conducted a campaign to remove the Sioux from treaty-established hunting grounds, which culminated with the annihilation of Custer and his entire regiment on June 25, 1876. See *id.* at 371.

27. 307 U.S. 433, 454-55 (1939).

28. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. L. REV. 26 n.2 (1970) [hereinafter cited as Friedman]. Footnote 2 states: "In his veto message to Congress concerning the Turtle Mountain Indians Jurisdictional Act, which would have referred certain tribal grievances to the Court of Claims, President Franklin D. Roosevelt declared that: '[t]his would require the Court of Claims and Supreme Court to pass upon questions of governmental policy in dealing with the Indians, and upon the propriety or impropriety of the Government's actions in specific cases. These are questions of a political nature which, heretofore, Congress has consistently refused to remit to the courts for review.' " S. Doc. No. 179, 73d Cong., 2d Sess. 8587 (May 10, 1934). See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

Indian claims were specifically excluded from Court of Claims jurisdiction when that forum was established by Congress in 1863.²⁹ There was no legal recourse; no courts were open to the many tribes who had been wronged by treaty violations. Through expensive lobbying efforts on Capitol Hill, the Indians could petition Congress, the perpetrator, for special jurisdictional acts, the first of which was enacted in 1881.³⁰ When such acts were passed, the courts frequently held that the grants of jurisdiction were insufficient to allow an inquiry into congressional treaty-making or treaty abrogation.³¹ This was abundantly demonstrated in *Sioux Tribe v. United States*³² the progenitor of *Sioux Nation*, where the Court of Claims required 76 pages to consider the scope of its authority under the special jurisdictional act, which it found "confers no equitable jurisdiction such as would be applicable to the claim here presented."³³

This legal disability was remedied by Congress when it established the Indian Claims Commission in 1946.³⁴ Indians

29. Act of Mar. 3, 1863, 12 Stat. 765, 767. Subsequently the court's jurisdiction was expanded to include equity and admiralty jurisdiction. However, the ban against Indian claims was continued. Tucker Act, ch. 359, § 1, 25 Stat. 505 (1887) [now 25 U.S.C. § 1491 (1964)].

30. Prior to the establishment of the Indian Claims Commission in 1946, 142 tribal claims were litigated in this manner. See *Hearings on H.R. 1341 and H.R. 1198 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 163-66 (1945).

31. An example is *Western (Old Settlers) Cherokee Indians v. United States*, 27 Ct. Cl. 1 (1891), *aff'd* 148 U.S. 427 (1892). The jurisdictional act granted the Court of Claims "unrestricted latitude in adjusting and determining the said claim, so that rights, legal and equitable, both of the United States and of said Indians [might] . . . be fully considered and determined." Yet this was held insufficient to allow an inquiry into allegations of fraud and duress by the United States Commissioners in procuring the treaty. The court said that Congress had not granted authority to question the validity of the treaty, since reformation of a treaty was a legislative function. It has been established that more than half of the special jurisdictional acts authorizing suit by Indian tribes had to be amended in an effort to make the alleged wrongs justiciable. *Hearings on S. 2731 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 13 (1935).

32. 97 Ct. Cl. 613 (1942).

33. *Id.* at 685. There has been considerable disagreement among and between the Indian Claims Commission and Court of Claims as to whether the 1942 Court of Claims took legal jurisdiction. As noted, it clearly did not take equitable jurisdiction. See text accompanying notes 134-138 *infra*.

34. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 [codified at 25 U.S.C. §§ 70-70v-3 (1976 & Supp. II 1978)]. Congress originally intended that the five-member commission serve only as an advisory panel. Congress believed the older claims would require lengthy testimony from historians, anthropologists and ethno-linguistic experts as part of a complex fact-finding task, which was to have been the sole function of the commission. However, Congress ultimately adopted a plan in which the commission evolved into a judicial tribunal. See Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. Rev. 325, 326-35 (1969).

would not only have their day in court, they would have their own special court. While this represented a quantum step in correcting the many historical wrongs inflicted upon the various tribes, it did not eliminate evidentiary and burden of proof problems,³⁵ as the Sioux would discover when the Indian Claims Commission dismissed their claim in 1954;³⁶ nor did it overcome the extraordinary power of Congress to manage Indian affairs.

*Plenary Power: An Absolute
Power Unless Subject to Judicial Review*

"The history of federal dealings with the Indian people has much too often been rule based on power, rather than on consent of the governed."³⁷ This power was symbolically demonstrated for the Sioux when the likeness of Washington, Jefferson, Lincoln, and Theodore Roosevelt were carved in colossal dimension on Mt. Rushmore in the Black Hills.

Plenary power is defined as "authority and power as broad as is required in a given case."³⁸ It is whole, complete, and exclusive power, but it is not absolute. Yet judicial deference to Congress' plenary power over Indians has rendered that power virtually unlimited.³⁹ Sioux counsel did not question the power of Congress to take the Black Hills, only the power to do so in derogation of the fifth amendment.⁴⁰ As Sioux counsel summarized, "The concern of this case is with just compensation, not good and evil."⁴¹

Plenary power over Indians and Indian affairs does not merely emanate from the Constitution;⁴² international law, treaty terms,

35. See Note, *Systemic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs*, 57 IOWA L. REV. 1300 (1972).

36. *Sioux Tribe v. United States*, 2 Ind. Cl. Comm. 646, 683 (1954), *aff'd* 146 F. Supp. 229 (Ct. Cl. 1956).

37. I AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 107 (1977).

38. BLACK'S LAW DICTIONARY 1039 (5th ed. 1979).

39. See, e.g., Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1226 (1975) [hereinafter cited as Chambers].

40. Brief for United States at 31, 448 U.S. 371 (1980).

41. *Id.* at 81.

42. Indians are expressly mentioned three times in the Constitution. Art. I, § 8, cl. 3 gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." Art. I, § 2, cl. 3 and amend. XIV, § 2 exclude "Indians not taxed" from the count for determining congressional apportionment. Art. II, § 2, cl. 2, the treaty-making power, implicitly extends to Indians. Art. I, § 8, cl. 1, Congress' power to "pay the debts" and provide for the "general welfare of the United States," has been extended to Indians, and is discussed in *Sioux Nation*, 448 U.S. at 401.

and case law are all sources.⁴³ Ironically, the greatest power over Indians derives from the doctrine of trust responsibility enunciated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*.⁴⁴ Subsequent cases demonstrated just how extensive that power had become. In *Lone Wolf v. Hitchcock*,⁴⁵ referred to in *Sioux Nation* as “the Indians’ Dred Scott decision,”⁴⁶ the Supreme Court found that on the basis of Congress’ role as guardian for its Indian wards, “Congress possessed a paramount power over the property of the Indians.”⁴⁷

In *Sioux Nation*, the government relied almost exclusively on *Lone Wolf*, arguing that Congress has virtually unreviewable power to dispose of Indian lands when acting as guardian and trustee “for the Indians’ benefit.”⁴⁸ While the standards of justiciability for Indian claims had left the Supreme Court powerless to intervene on behalf of the Sioux in two earlier attempts with the same claim,⁴⁹ the Court has found its own voice and now holds that an objective view of the 1877 Act reveals that Congress acted not as a guardian but a conqueror.⁵⁰

While the Court in *Sioux Nation* found *Lone Wolf* inapplicable, it rejected *Lone Wolf*’s presumption of congressional good faith.⁵¹ In this way, *Lone Wolf* still stands as the fountainhead of Congress’ plenary power over Indians, but it is no longer a barrier to reasonable inquiry of long-past deeds of the government. In rejecting the presumption of congressional good faith, the Court in *Sioux Nation* held that:

[W]hether a particular congressional measure was appropriate for protecting and advancing a tribe’s interests, and therefore not subject to the Just Compensation Clause, is factual in nature, and the answer must be based on a consideration of all the evidence presented. While a reviewing court is not to

43. While Congress is not bound to adhere strictly to the principles of international law, they hold considerable moral suasion. See text accompanying notes 57-59 *infra*.

44. 30 U.S. (5 Pet.) 1 (1831). In this landmark case, Chief Justice Marshall enunciated the guardian-ward concept of the relationship between the United States and the various Indian tribes. See text accompanying notes 162-170 *infra*.

45. 187 U.S. 553 (1903).

46. *Sioux Nation v. United States*, 601 F.2d at 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff’d*, 448 U.S. 371 (1980).

47. 187 U.S. 553, 565 (1903).

48. Brief for United States at 71, 448 U.S. 371 (1980).

49. 318 U.S. 789 (1943), *cert. denied*; 423 U.S. 1016 (1975), *cert. denied*.

50. 448 U.S. at 415.

51. *Id.* at 414-15.

second-guess a legislative judgement, the court is required, in considering whether the measure was taken in pursuance to Congress' power to manage and control tribal lands for the Indians' welfare, to engage in thorough and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry.⁵²

The Age of Colonialization and Conquest

Because it is the dictate of the Supreme Court that "a thorough and impartial examination of the historical record" be made,⁵³ and because the 1877 Act cannot be fully appreciated without an understanding of the historical basis of federal Indian policy, the following summary of events is offered.

Shortly after Columbus "discovered" the New World, Spain and Portugal signed the Treaty of Tordesillas, with the Pope's blessing, establishing a Spanish and Portuguese division of the world.⁵⁴ Indians were considered heathens, to be subjugated to the will of their "discoverers."⁵⁵ Title to lands in the New World would accrue upon discovery or conquest.⁵⁶

As international law principles developed, the rights of Indians were recognized. Franciscus de Victoria,⁵⁷ whose lectures form the basis of international law, argued in the 1520s that Indians were human beings, and that their possession of land should be respected, even where no formal deeds or treaties existed. He maintained that the Treaty of Tordesillas could serve only as establishing zones for trading and proselytizing, not as a distribution of land.⁵⁸ Our respect for Indian title and occupancy can be traced to these Spanish origins.⁵⁹

In 1625 the first deed of Indian land granted to English colonists was signed by Chief Samoset, a Pemaquid, giving 12,000 acres to the first settlers at Plymouth Rock.⁶⁰ One hundred fifty-

52. *Id.* (syllabus), at 373.

53. *Id.*

54. See W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 5 (1971) [hereinafter cited as WASHBURN].

55. *Id.* at 6.

56. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573-76 (1823).

57. The Seventh Pan-American Conference, on Dec. 23, 1943, acclaimed Victoria as the man "who established the foundations of modern international law."

58. F. Victoria, *De Indis et de Ivre Belli Reflectiones* 110, 11 (1557), CLASSICS OF INTERNATIONAL LAW 262-63 (J. Bate tr. 1917).

59. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 45 (1947).

60. D. BROWN, BURY MY HEART AT WOUNDED KNEE 3 (1970) [hereinafter cited as BROWN].

two years later, in one of the first great acts of our Congress, the Northwest Ordinance of July 13, 1787, declared:

Art. 3 . . . The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.⁶¹

This high standard was incompatible with the insatiable territorial demands of the huge tide of European immigrants, as they settled outward from the original colonies.⁶² Thus, voluntary cessions by the Indians became virtually impossible. The response of the government was to effect a policy of Indian removal, and between 1789 and 1850, 245 treaties were imposed on the Indians, transferring ownership in 450 million acres of land at twenty cents an acre.⁶³

By the 1830s Indian relations were in a state of chaos. Lewis Cass, the then secretary of the war department, which was in charge of Indian affairs, stated in his annual report that "[a] crisis in Indian affairs has evidently arrived which calls for the establishment of a system of policy adapted to the existing state of things, and calculated to fix upon a permanent basis the future destiny of the Indians."⁶⁴ In direct response to Secretary Cass's report, Congress passed the Indian Trade and Intercourse Act of 1834,⁶⁵ which had the effect of recodifying past legislation regarding Indian removal. The most significant part of the Act was its definition of Indian country:

[T]hat all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this

61. Ch. 8, 1 Stat. 51n (1789).

62. W. BLUMENTHAL, *AMERICAN INDIANS DISPOSSESSED* 18 (1955) [hereinafter cited as BLUMENTHAL].

63. *Id.*

64. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 256 (1962).

65. Ch. 161, 4 Stat. 729 (1834).

act, [shall] be taken and deemed to be the Indian country.⁶⁶

Before the ink was dry, Congress moved this "permanent Indian frontier" from the Mississippi to the 95th Meridian, another 200-300 miles farther west.⁶⁷

The treatment of Indians in this period of President Andrew Jackson's accelerated Indian removal is one of the most shameful chapters in our history and is a stain upon the national honor that can never be completely erased. In the South, Choctaws, Cherokees, Chickasaws, Creeks, and Seminoles were forced to give up their homelands. Bitter and expensive War Department operations were implemented to effect the removal policy.⁶⁸ Cherokees were put in prison camps, then marched along the infamous "Trail of Tears," where one in four died of cold and starvation.⁶⁹ By 1860, the United States had grown to a nation of some thirty million mostly European descendants.⁷⁰ The Indian population at that time was perhaps in excess of one-quarter million, less than half what it had been when Samoset had shared corn with the starving Pilgrims at Plymouth Rock.⁷¹

Brief Sioux History

From time immemorial, the Sioux inhabited the lush forests at the headwaters of the Mississippi River.⁷² French fur traders and Roman Catholic priests dealt successfully with the Sioux from the 1630s until the mid-1700s, when the Sioux were invaded by the Ojibwa Tribe, which was armed with European firearms.⁷³ The Sioux retreated to the prairies and distant foothills of the Rocky Mountains. As the Sioux became accustomed to a new life-style in these regions, representatives from France, Spain, and later the United States proclaimed title to the same region, known then as Upper Louisiana.⁷⁴

Thomas Jefferson, who continued the tradition of the "Great White Father" begun by George Washington, by referring to the

66. *Id.*, § 1.

67. BROWN, *supra* note 60, at 6.

68. G. FOREMAN, INDIAN REMOVAL 383-85 (1932).

69. BROWN, *supra* note 60, at 6.

70. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS, 8, U.S. BUREAU OF THE CENSUS (1975).

71. BROWN, *supra* note 60, at 9.

72. HOOVER, *supra* note 18, at vii.

73. *Id.* at viii.

74. *Id.* at ix.

Indians as “my children” and “my son,”⁷⁵ had been privately advocating an expedition across the Louisiana Territory since the Washington administration.⁷⁶ When the Louisiana Purchase was consummated with unexpected swiftness in 1803, Jefferson had already organized the Lewis and Clark expedition, which would peacefully encounter many Indian tribes, including the Sioux.⁷⁷ It is worth noting that the terms of the Louisiana Purchase required that the inhabitants of the territory be entitled “to the enjoyment of all the rights, advantages and immunities of citizens of the United States” according to the principles of the Federal Constitution.⁷⁸ Presumably, this was not meant to include Indians.⁷⁹

In 1805 the United States entered its first treaty with the Sioux, in which Lieutenant Zebulon Pike⁸⁰ obtained a grant from the Sioux

for the purpose of the establishment of military posts, nine miles square at the mouth of the river St. Croix, also from below the confluence of the Mississippi and St. Peters, up the Mississippi, to include the falls of St. Anthony, extending nine miles on each side of the river. That the Sioux Nation grants to the United States, the full sovereignty and power over said districts forever, without any let or hindrance whatsoever.⁸¹

In consideration of the above grants, the United States agreed to pay the Sioux \$2,000, or the equivalent in merchandise.⁸²

The Sioux made additional land cessions to the United States in treaties concluded in 1836, 1837, and 1851,⁸³ among others, each time being confined to a smaller area. The Supreme Court, in its *Sioux Nation* opinion, gives an excellent survey of the relations between the Sioux and the United States, beginning with the Fort Laramie Treaty of April 29, 1868.⁸⁴ It is a version of history that the Sioux can basically accept.

75. 16 A. LIPSCOMB & A. BERGH, *THE WRITINGS OF THOMAS JEFFERSON* 425-27 (1904).

76. C. BOWERS, *THE YOUNG JEFFERSON, 1743-1789*, 427 (1945).

77. 7 R. THWAITES, *ORIGINAL JOURNALS OF LEWIS AND CLARK EXPEDITION, 1804-06*, 522 (1904).

78. S. WEBSTER, *TWO TREATIES OF PARIS AND THE SUPREME COURT* 3 (1901).

79. *Id.* at 4.

80. Namesake for Pike's Peak, 14,110 feet, the 32nd highest and most famous mountain in Colorado. U.S Geological Survey.

81. G. FAY, *TREATIES, AND LAND CESSIONS, BETWEEN THE BANDS OF THE SIOUX AND THE UNITED STATES OF AMERICA, 1805-1906*, 1, art. 1 (1972).

82. *Id.*, art. 2.

83. *Id.* at 43-75.

84. 15 Stat. 635.

The abrogation of the 1868 Treaty is the basis of this lawsuit.⁸⁵ While an unbroken Indian treaty is a rarity, "a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history,"⁸⁶ than the breaking of the Fort Laramie Treaty.

The army, at the direction of Congress and President Grant, unceremoniously violated the 1868 Treaty when it conducted a reconnaissance expedition into the Black Hills.⁸⁷ In 1874 Brevet Major General George Armstrong Custer led the mission and had prearranged to announce the discovery of gold.⁸⁸ This news brought a flood of miners to the Black Hills, which the Grant administration then used as justification for new negotiations with the Sioux.⁸⁹ When commissioners appointed to the task failed to reach an agreement, they recommended that Congress fix a sum "as a fair equivalent of the value of the hills" and present it to the Indians as a finality.⁹⁰ As the Supreme Court held, a fair equivalent was never paid.⁹¹

The Court reached this conclusion by application of the *Fort Berthold* "good faith effort" test.⁹² An objective inquiry into Congress' enactment of the 1877 Act led the Court of Claims to find that, "the terms upon which Congress acquired the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price."⁹³ Furthermore, "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient."⁹⁴ And finally, "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they

85. 448 U.S. 371 (1980).

86. 207 Ct. Cl. at 241.

87. W. WASHBURN, ASSAULT ON INDIAN TRIBALISM, THE GENERAL ALLOTMENT ACT OF 1887, 4 (1975).

88. D. JACKSON, CUSTER'S GOLD 86 (1966).

89. Letter from President Ulysses S. Grant to the Senate and House of Representatives, Dec. 22, 1876, S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 1.

90. 1 W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES 199-203 (1973).

91. 448 U.S. at 424.

92. *Id.* at 407-409.

93. 601 F.2d at 1167.

94. *Id.* at 1166.

could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them.”⁹⁵

Litigation Chronology

From 1877 to 1920, the Sioux Indians were barred from suing the government.⁹⁶ In 1909 the Sioux petitioned Congressman Eben Wever Martin, seeking payment for their pony herds which had been confiscated after Custer's defeat at the battle of Little Big Horn. Congressman Martin refused to get on the petition.⁹⁷

In 1923, pursuant to a special jurisdictional act,⁹⁸ the Sioux filed a petition in the Court of Claims. The case was not heard until 1942, when it was dismissed.⁹⁹ The extreme delay between the filing of the suit and the 1942 adjudication can only be attributed to the combination of the Great Depression and the political turbulence preceding World War II, and the fact that the Sioux were less eager to seek money damages than the return of the land,¹⁰⁰ the latter being beyond the power of the court.¹⁰¹ In 1946, Congress established the Indian Claims Commission.¹⁰² Four years later, in 1950, the Sioux resubmitted their claim to the Indian Claims Commission. In 1954 the claim was dismissed for failure to meet the burden of proof.¹⁰³ After the dismissal was affirmed on appeal to the Court of Claims, the Sioux retained new counsel, who were able to have the affirmance vacated.¹⁰⁴

In November of 1958, the Indian Claims Commission reopened the case.¹⁰⁵ A decision was reached in 1974 holding that the 1877 Act constituted a fifth amendment taking.¹⁰⁶ However, the Court of Claims reversed, holding in 1975 that *res judicata* barred

95. *Id.* at 1168.

96. See text accompanying note 28, *supra*.

97. Deloria, "Like the Victory Over Custer, the Sioux's Legal Win Can Mean Defeat," *L.A. Times*, July 6, 1980, pt. iv (opinion), at 1 [hereinafter cited as Deloria].

98. Act of June 3, 1920, ch. 222, 41 Stat. 738 (waiver of sovereign immunity and grant of jurisdiction to Court of Claims).

99. 97 Ct. Cl. at 689.

100. Telephone conversation Feb. 18, 1981, with Robert T. Coulter, counsel for Amicus Curiae Indian Law Resource Center, *United States v. Sioux Nation*, 448 U.S. 371 (1980).

101. 28 U.S.C. § 1491.

102. 60 Stat. 1049 (1946), *as amended*, 25 U.S.C. §§ 70-70v (1964).

103. 2 Ind. Cl. Comm. at 670, 683 (1954).

104. See *Sioux Tribe v. United States*, 182 Ct. Cl. 912 (1968) (Summary of proceedings. This unusual result—vacation of judgment—was achieved by allegations of incompetence of former Sioux counsel.) See 448 U.S. at 385 and 33 Ind. Cl. Comm. at 152.

105. 182 Ct. Cl. at 913.

106. 33 Ind. Cl. Comm. at 362.

recovery¹⁰⁷ under the fifth amendment but allowing a claim under section 70a(5) of the Indian Claims Commission Act without interest.¹⁰⁸ Sioux lawyers successfully lobbied Congress for a waiver of res judicata and instruction for de novo review by the Court of Claims in 1979.¹⁰⁹

The Legal Battleground

The *Indian Law Reporter* succinctly stated the issue of *Sioux Nation*: "Does legislation that divests an Indian tribe of a portion of its lands in consideration of undertaking to provide material assistance and food rations as long as needed amount to 'taking' under the Fifth Amendment's Just Compensation Clause so as to entitle the tribe to interest on later award for the value of the lands?"¹¹⁰ The answer to the question posed is no, if the court does not, cannot, or will not take jurisdiction. Two threshold issues of justiciability must be determined before the fifth amendment question can be answered. First, is res judicata a bar? Second, is this a political question? To the first preliminary question, the Court of Claims held yes, in 1975.¹¹¹ "The Commission's taking theory founders on the bar of res judicata."¹¹²

To the second inquiry, "is this a political question", the Court of Claims answered affirmatively in 1942,¹¹³ citing *Beecher v. Wetherby*.¹¹⁴ The court found the jurisdictional act sufficient for

107. 207 Ct. Cl. at 241.

108. Section 70a of the Indian Claims Commission Act establishes five categories of wrongs made compensable under its terms, none of which authorizes payment of interest: "(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Ch. 959, 60 Stat. 1050 (1946), 25 U.S.C. § 70a (1976).

109. Act of Mar. 13, 1978, 92 Stat. 153.

110. 7 INDIAN L. RPTR. 1010, May, 1980, paraphrasing the language contained in the Brief for the United States at 2, 448 U.S. 371 (1980).

111. 207 Ct. Cl. at 241.

112. *Id.*

113. 97 Ct. Cl. at 672.

114. 95 U.S. 517, 565 (1877).

the adjudication of legal claims¹¹⁵ but insufficient to “go behind the Acts of Congress and inquire into any moral obligation of the Government. . . . We cannot consider and adjudicate it unless and until Congress has unmistakably indicated its intention that we should do so.”¹¹⁶ If only Congress is to determine when there shall be judicial review, then, *q.e.d.*, it is a political question.¹¹⁷

When the Supreme Court adjudicated these same two issues in 1980, it held opposite to the 1942 and 1975 Court of Claims decisions. Yet the Supreme Court did not reverse the Court of Claims on either occasion; it denied certiorari on motion by Sioux counsel.¹¹⁸

As between the issues of res judicata and the political question doctrine, the latter is by far the more intriguing. Res judicata was not an issue in *Sioux Nation* until 1975,¹¹⁹ whereas politics have been determinative from the beginning.

Res Judicata and Separation of Powers

In *Sioux Nation*, defendant United States challenged only the award of interest as part of the final judgment of the 1979 Court of Claims.¹²⁰ The government did not argue the defense of res judicata. It was Justice Rehnquist who sought, *sua sponte*, to dismiss the Sioux claim.¹²¹ In his dissenting opinion, Justice Rehnquist states that the policies underlying res judicata are “not

115. 97 Ct. Cl. at 686.

116. *Id.* at 685.

117. Six criteria relating to the determination of a political question are enunciated in *Baker v. Carr*, 369 U.S. 186, 217 (1962): “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” Each of these criteria has had some degree of applicability to Indian claims; see text accompanying the following notes for examples of each: (1) note 42 *supra*; (2) note 27 *supra*; (3,4) notes 147-149 *infra*; (5) note 116 *supra*; and (6) note 167 *infra*.

118. 318 U.S. 789 (1943), *cert. denied*; 423 U.S. 1016 (1975), *cert. denied*.

119. Res judicata was discussed in the 1954 Indian Claims Commission opinion, but the Commission said, “In view of the decision rendered on the merits, the question of whether or not the decisions are res judicata becomes immaterial.” 2 Ind. Cl. Comm. at 673.

120. Brief for United States at 48, 448 U.S. 371 (1980).

121. *Id.* at 432.

based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste."¹²²

When the Indian Claims Commission was established in 1946, Congress waived the defenses of sovereign immunity and statute of limitations.¹²³ There was no general waiver of *res judicata* included in the Act; therefore, a previous decision on the merits would constitute a bar to further litigation of the same claim. Thus, when the 1975 Court of Claims held that the Sioux claim was barred by the *res judicata* effect of the 1942 Court of Claims decision,¹²⁴ Sioux counsel petitioned Congress for an amendment to the Indian Claims Commission Act.¹²⁵ Their success is reflected in Public Law 95-243, which states in material part:

[T]he Court of Claims shall review on the merits, without regard to the defense of *res judicata* or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue *de novo*.¹²⁶

Justice Rehnquist is probably correct when he says, "I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding. . . ."¹²⁷ However, his opinion in this instance is not entirely inconsistent with the majority holding, for while Congress certainly could not compel the Court to readjudicate the Sioux claim, nor any other previously litigated case,¹²⁸ there can be no doubt that the Supreme Court has the power to accept a waiver of *res judicata* by Congress, and relitigate a claim if it chooses.¹²⁹ Rehnquist, the lone dissenter,

122. *Id.*

123. 60 Stat. 1049 (1946), *as amended*, 25 U.S.C. § 70a (1976).

124. 207 Ct. Cl. at 241.

125. Lewin, *supra* note 22, at 17, col. 3.

126. Pub. L. 95-243, 92 Stat. 153, *amending* § 20(B) of the Indian Claims Commission Act. *See* 25 U.S.C. § 70s(b) (Supp. II 1976).

127. 448 U.S. 371, 424 (1980).

128. *Pope v. United States*, 323 U.S. 1, 8-9 (1944).

129. *Warthen v. United States*, 157 Ct. Cl. 798, 800 (1962).

would not be compelled to reexamine a "question previously decided by an Art. III Court."¹³⁰

The majority in *Sioux Nation* carefully considered the directive of Public Law 95-243 to determine if it constituted a violation of the separation of powers doctrine. This inquiry is pursued by the Court on two levels.¹³¹ The first is whether "Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions."¹³² The second is whether Congress "overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left the Court no adjudicatory function to perform."¹³³ The Court concluded that "neither of the two separation of powers objections described above is presented by this legislation."¹³⁴

While the government chose not to argue the defense of res judicata before the Supreme Court, it did raise the claim in the 1975 Court of Claims.¹³⁵ However, when Justice Rehnquist says that the Court of Claims "found no basis for relieving the Sioux from the bar of res judicata . . .,"¹³⁶ he fails to mention that there was no discussion of whether the Court had the power to accept a congressional waiver of res judicata, but merely whether the 1942 Court of Claims had taken jurisdiction and reached its decisions on the merits of the Black Hills taking claim.¹³⁷ For if it did not, res judicata would not apply.¹³⁸

The 1975 Court of Claims was obviously annoyed as to this question when it responded to the 1974 Indian Claims Commission. It held that, "The Commission really imputes a gross impropriety to this court,"¹³⁹ because the 1974 Commission con-

130. 448 U.S. at 434.

131. *Id.* at 391.

132. *Id.*

133. *Id.* at 392.

134. *Id.* at 395.

135. Answering Brief for United States at 9, 200 Ct. Cl.

136. 448 U.S. at 426.

137. 207 Ct. Cl. at 249.

138. "It is settled that the judgement of a court dismissing a suit for lack of jurisdiction is not a judgement on the merits and therefore does not bar a future suit on the same cause of action. *Smith v. McNeal*, 109 U.S. 426, 429 (1883); *Hughes v. United States*, *supra*; *Walden v. Bodley*, 39 U.S. (14 Pet.) 156, 161 (1840); *see General Investment Co. v. Lake Shore & Michigan Southern Ry*, 260 U.S. 261, 288 (1922). If, as plaintiffs argue, the Court of Claims dismissed their claim in 1942 for lack of jurisdiction plaintiffs are not barred from reasserting that claim." 33 Ind. Cl. Comm. at 196-97.

139. 207 Ct. Cl. at 242.

cluded that the 1942 Court of Claims held that it lacked jurisdiction over the Sioux claim.¹⁴⁰

Judge Davis's dissenting opinion in the 1975 Court of Claims offers the best argument in favor of the position maintained by the 1974 Indian Claims Commission, gross improprieties notwithstanding, that jurisdiction was not taken in 1942:

In the end, the best I can make of the 1942 opinion is that the terms of the jurisdictional act were so entangled in the court's mind with its ultimate determination adverse to the Indians on the Fifth Amendment claim that the Government should fail in its current defense of *res judicata*. The "jurisdictional" component seems to me to have been too large a factor in the 1942 holding to preclude the Nation from its right to show now that the acquisition of the Black Hills was a Fifth Amendment taking, without just and adequate compensation, rather than merely a violation of fair and honorable dealings. I am not persuaded that in 1942 the Indians had the opportunity to present their Fifth Amendment claim to a tribunal which deemed itself fully empowered to decide all aspects of that demand on their merits.¹⁴¹

A summary review of the Court's holding relative to *res judicata* reveals that:

(1) "The power of Congress to waive such an adjudication, of course, is clear."¹⁴²

(2) "Congress may recognize its obligation to pay a moral debt."¹⁴³

(3) Where Congress is "to all intents and purposes the defendant," it is not an invasion of the judicial power to "come into court . . . and say that they will not plead the former trial in bar,

140. 33 Ind. Cl. Comm. at 207.

141. 207 Ct. Cl. at 253-54.

142. *Cherokee Nation v. United States*, 270 U.S. 476, 486 (1926). "The power of Congress by special act to waive any defense, either legal or equitable, which the Government may have to a suit in this court, as it did in the *Nock* and *Cherokee Nation* cases, has never been questioned. The reports of the court are replete with cases where Congress, impressed with the equitable justice of claims which have been rejected by the court on legal grounds, has, by special act, waived defenses of the Government which prevented recovery and conferred jurisdiction on the court to again adjudicate the case. In such instances the court proceeded in conformity with the provisions of the act of reference and in cases, too numerous for citation here, awarded judgments to claimants whose claims had previously been rejected." *Richardson v. United States*, 81 Ct. Cl. 948, 957 (1935).

143. *United States v. Realty Co.*, 163 U.S. 427, 440 (1896).

nor interpose the legal objection which defeated a recovery before. . . ."¹⁴⁴

Given this holding by the Supreme Court, there is no reason why any Indian claim previously adjudicated by the Indian Claims Commission, the Court of Claims, or the Supreme Court itself could not be relitigated, if Congress waives *res judicata*. As might be expected, there is a catch-22: the precedential value of holdings pursuant to special jurisdictional acts, such as *Sioux Nation*, and all other Indian Claims Commission holdings, "may be limited to the jurisdiction conferred by those acts."¹⁴⁵ And, of course, whether Congress chooses to waive *res judicata* is a political question.

The Political Question Doctrine

When the Court of Claims dismissed the Sioux's Black Hills suit in 1942, it cited *Beecher v. Wetherby*.¹⁴⁶ "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."¹⁴⁷ *Lone Wolf v. Hitchcock*,¹⁴⁸ upon which the government relied heavily in the Black Hills case, also cites *Beecher v. Wetherby* at length, echoing the notion that Indian affairs are not subject to judicial review.¹⁴⁹ Before 1946, suits by Indian tribes, other than those under special jurisdictional acts, were generally limited to equitable jurisdiction, as "injunctive remedy was the only one available" to the tribes.¹⁵⁰

After 1946, when Congress established the Indian Claims Commission, the courts had less reason to hold that Indian affairs were beyond the scope of judicial inquiry. However, there remained two monumental barriers to the cause of the Indians. The first is the principle that Congress may unilaterally abrogate Indian treaties.¹⁵¹ This is analogous to the rule that Congress may enact legislation inconsistent with treaties between the United

144. *Nock v. United States*, 2 Ct. Cl. 451, 457-58 (1867).

145. Chambers, *supra* note 39, at 1247.

146. 95 U.S. 517 (1877).

147. 97 Ct. Cl. at 672.

148. 187 U.S. 553 (1903).

149. *Id.* at 568.

150. Nichols, J., concurring, 601 F.2d at 1174.

151. 187 U.S. 553, 566 (1903). "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." *Cherokee Tobacco Cases*, 78 U.S. (11 Wall.) 616, 621 (1871).

States and foreign nations and, likewise, Congress may enter treaties with foreign nations inconsistent with existing legislation.¹⁵² While the appearance of uniformity is preserved, unilateral abrogation of Indian treaties fails to honor the unique trust relationship between the United States and the various Indian tribes.¹⁵³

A second barrier, and even more devastating to the tribes' quest for justice, has been the presumption that whenever Congress enacts legislation pursuant to its trust responsibility, it is acting "in perfect good faith" for the benefit of the tribes.¹⁵⁴ For example, in *Sioux Nation*, the government argued that, "A disposal of tribal property in the discharge of this responsibility to manage the property for the tribe's benefit is an act on behalf of the tribe and, in effect, a disposal by the tribe."¹⁵⁵ It was further argued that, "In our view, the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe."¹⁵⁶

It is difficult to imagine how the confiscation of the Black Hills, with its billions of dollars in gold, silver, uranium, and other natural resources¹⁵⁷ could be called management "to promote the welfare of the tribe." As Cardozo said in another Indian "taking" case, "Spoilation is not management."¹⁵⁸

Nevertheless, convoluted logic of this type has prevailed over our Indian brothers for three centuries. Subjugation of the tribes has resulted not only from the sword and gun, but from the rule of law, which in their case is accurately described as "the whim of the sovereign."¹⁵⁹

The Supreme Court has always proceeded with extreme caution in the face of opposition from the political branches of government, *i.e.*, the legislative and executive departments.¹⁶⁰ In what

152. "The last expression of the sovereign will must control." *Chinese Exclusion Case*, 130 U.S. 581, 600 (1889). See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 141 (1965).

153. See text accompanying notes 164-170 *infra*.

154. 187 U.S. 553, 568 (1903).

155. Brief for United States at 48, 448 U.S. 371 (1980).

156. *Id.* at 52.

157. See note 2 *supra*.

158. *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937), cited in 448 U.S. at 408.

159. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*. 31 HASTINGS L.J. 1215 (July, 1980) [hereinafter cited as Newton].

160. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* ch. 4 (1962).

has been described as "the most serious crisis in the history of the Court,"¹⁶¹ Chief Justice John Marshall formulated the concept of the trust relationship between the United States and the Indians.

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian.¹⁶²

Marshall's decision in *Cherokee Nation* has been compared to his decision in *Marbury v. Madison*,¹⁶³ where the Chief Justice established the fundamental constitutional law principle of judicial review.¹⁶⁴ In each case, the Court held that it lacked jurisdiction, partly because the authority of the Supreme Court was open to some question. In the follow-on case to *Cherokee Nation*, *Worcester v. Georgia*,¹⁶⁵ Chief Justice Marshall was more assertive. There, the Court overturned two Georgia indictments on the ground that the state of Georgia had no jurisdiction on Cherokee land.¹⁶⁶ For his courage, Marshall was rebuffed; the Court's order was never enforced. President Jackson defiantly proclaimed, "John Marshall has made his decision; now let him enforce it."¹⁶⁷

Nevertheless, the *Cherokee Nation* decision remains at the heart of the federal-Indian relationship. The guardian-ward concept has been expanded by the courts and is described as "moral obligations of the highest responsibility and trust."¹⁶⁸ Yet the concept of the trust relationship enunciated by Marshall in *Cherokee Nation* has been used by Congress as a springboard to expanded powers over Indians. The Court has consistently held that the tribes were incapable of prudent management of their

161. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 189 (1923).

162. 30 U.S. (5 Pet.) 1, 17 (1831).

163. 5 U.S. (1 Cranch) 137 (1803).

164. *Id.* at 176.

165. 31 U.S. (6 Pet.) 515 (1832).

166. *Id.* at 596-97.

167. 1 H. GREELEY, AMERICAN CONFLICT 106 (1864).

168. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), relied upon in *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (1966); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (1973).

communal property,¹⁶⁹ and on that assumption expressed little difficulty in deferring to the presumptively better judgment of the trustee, Congress. The Court made this clear in the relatively recent decision of *Board of County Commissioners v. Seber*¹⁷⁰:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified, members of the modern body politic.¹⁷¹

While Sioux counsel acknowledged "the underlying constitutional authority of Congress to manage and dispose of Indian property for their best interests,"¹⁷² they urged the Court to reject the "presumption that any legislation by Congress was intended to promote the welfare of the Sioux. . . ."¹⁷³

The Supreme Court, in a significant departure from the command of *Lone Wolf*, held that the *Lone Wolf* Court's

conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*.¹⁷⁴

The Standard of Review and Fiscal Considerations

It is an inescapable conclusion that the courts have struggled to formulate a special standard of review for Indian claims under the fifth amendment just compensation clause which would not "distribute any undue share of the nation's wealth to the Indians."¹⁷⁵

In *Sioux Nation*, in denouncing the very standard the Supreme Court would later praise, Court of Claims Judges Bennett and

169. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902).

170. 318 U.S. 705 (1943).

171. *Id.* at 715.

172. Brief for Sioux at 86, 448 U.S. at 413.

173. Brief at 37-8.

174. *Id.*, citing 430 U.S. 73, 84 (1977).

175. Chambers, *supra* note 39, at 1227.

Kunzig stated, "courts must be careful in construing ambiguous precedents where the results of liberal construction are enormous judgments against the United States."¹⁷⁶ The Supreme Court itself has admittedly been influenced by fiscal considerations. In *Tee-Hit-Ton Indians v. United States*,¹⁷⁷ Justice Reed, writing for the majority, cited a Justice Department report that estimated liability of the United States for Indian land claims at \$9 billion.¹⁷⁸ Justice Reed's reliance on that figure was misplaced; the record now shows, twenty-five years after *Tee-Hit-Ton*, that the total damages awarded by the Indian Claims Commission is less than 10 percent of the Justice Department estimate.¹⁷⁹ Other, more thorough, research shows an even greater difference.¹⁸⁰

The biggest reason for the disparity is the matter of interest. Under the just compensation clause of the fifth amendment, interest is a recognized component,¹⁸¹ even for Indian claims.¹⁸² When 5 percent interest is added to a 100-year-old claim, for example, the result is an award multiplied fivefold. However, not all Indian land claims are cognizable under the fifth amendment;¹⁸³ furthermore, the Indian Claims Commission Act, by its terms, establishes legal and equitable grounds of recovery, but is silent on the question of interest.¹⁸⁴

176. 601 F.2d at 1182.

177. 348 U.S. 272 (1955).

178. *Id.* at 283 n.17.

179. See UNITED STATES INDIAN CLAIMS COMM'N, FINAL REPORT 125 (1978). (Total awards: \$818,172,606.64. The \$9 billion estimate presumed a dismissal rate of zero, when in fact it approached 50 percent.)

180. See Newton, *supra* note 159, at 1249 n.201.

181. Jacobs v. United States, 290 U.S. 13, 16-17 (1933).

182. Justice Cardozo put the matter in clear perspective, writing in *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1936): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that 'would not be an exercise of guardianship, but an act of confiscation.' *United States v. Creek Nation*, *supra*, p. 110; citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308."

183. Justice Reed's fears in *Tee-Hit-Ton* are the basis for the distinction between "aboriginal title" or "original Indian title" and "recognized title." The latter exists where Congress, by treaty or act, has recognized specific Indian tribes as "owners" of defined areas. A taking by Congress of "recognized title" lands requires just compensation under the fifth amendment. A taking by the United States of "aboriginal title" was held not compensable under the fifth amendment in *Tee-Hit-Ton*, 348 U.S. 272, 277, 279, 284-85, 290-91 (1955). See also note 108, *supra*.

184. See note 108, *supra*.

The courts have utilized a variety of methods to avoid an award of interest.¹⁸⁵ In the *Sioux* case, the 1975 Court of Claims considered the distinction between an award pursuant to section 70a(5)¹⁸⁶ of the Indian Claims Commission Act, and an award based on Congress' exercise of its power of eminent domain, which would invoke the fifth amendment. The opinion quotes the following oral argument:

Judge Davis: . . . The difference really is, whether the Tribes will be entitled to interest on whatever the valuation is? The Commission came up with . . .

Gov't Atty.: 17 million dollars . . .

Judge Davis: But now the whole difference is interest, whether they get paid the interest?

Gov't Atty.: That's all we're arguing about.¹⁸⁷

The court's holding was consistent with the government's desire to restrict the award to principal only; it allowed the Sioux's claim under section 70a(5) but denied the fifth amendment claim, which would have included interest, on the bar of *res judicata*.¹⁸⁸

The Fort Berthold "Good Faith Effort" Test

In 1968 the Court of Claims attempted to reconcile Congress' "paramount power over the property of Indians" as exemplified by *Lone Wolf*,¹⁸⁹ and the more recent series of decisions that held that this plenary power "was not absolute."¹⁹⁰ The result of that effort in *Three Tribes of Fort Berthold Reservation v. United States*¹⁹¹ was the "good faith effort" test,¹⁹² which developed a formula to determine whether Congress, in enacting legislation affecting Indians, is acting as trustee for the benefit of the Indians, or is exercising its sovereign power of eminent domain.¹⁹³ The 1979 Court of Claims summarized the test as follows:

In determining whether Congress has made a good faith effort

185. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 526-28 (1966).

186. See note 108, *supra*.

187. 207 Ct. Cl. at 237.

188. *Id.* at 240-41.

189. 187 U.S. 553 (1903).

190. *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

191. 182 Ct. Cl. 543 (1968).

192. *Id.* at 553.

193. *Id.*

to give the Indians the full value of their lands when the government acquired it, we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition. As hereinafter shown, this is the kind of evidence upon which we have relied in reaching our conclusion in this case.

The "good faith effort" and "transmutation of property" concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets, as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired.¹⁹⁴

While the Supreme Court found this test "a standard that ought to be emulated,"¹⁹⁵ the *Fort Berthold* test has been severely criticized.¹⁹⁶ The dissenting opinion in the 1979 Court of Claims states that the *Fort Berthold* standard "makes a mockery out of the fifth amendment. . . ."¹⁹⁷ This paper will not pursue that contention, for while the "good faith effort" test is arguably more stringent than the normal standard¹⁹⁸ for fifth amendment violations, its application in *Sioux Nation* resulted in a finding of a fifth amendment taking.¹⁹⁹

194. 601 F.2d at 1162.

195. 448 U.S. at 424.

196. See Friedman, *supra* note 28. Sioux counsel described the test as "ill-conceived, unnecessary and erroneous." Brief for Sioux at 56, 448 U.S. 371 (1980).

197. 601 F.2d at 1181.

198. Ever since *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), determination of just compensation has been a judicial function. Under the *Fort Berthold* test, the courts may make such a determination only upon a showing of fraud or bad faith.

199. See notes 90-95 and accompanying text, *supra*.

Conclusion

The Black Hills case is far from over. The Oglala Sioux Tribe has entered a stipulation with the government halting payment of their share of the \$105 million award,²⁰⁰ and other tribes of the Sioux Nation may also refuse to accept the award. Acceptance of money damages would probably extinguish any Sioux land claims in the Black Hills.²⁰¹ Yet assuming that the tribes decide to take the money, disbursement will take several years; tribal membership rolls must be verified,²⁰² and a plan for use of the money must be approved in turn by the Bureau of Indian Affairs, the Department of Interior, and finally, Congress.²⁰³

In the hope that at least some of the land taken by the 1877 Act would be returned to the Sioux, the Oglala Tribe filed a suit on July 18, 1980, in federal district court seeking to quiet title to "certain land, commonly referred to as the Black Hills."²⁰⁴ The suit was dismissed on September 11, 1980, and the Oglala appealed.²⁰⁵ On January 18, 1982, the Supreme Court denied certiorari.

Congress—and the courts—have struggled with the "Indian problem" since colonial days. When the problem was viewed as a military one, the army was called out; when the dilemma was seen as one of civilizing the Indians, missionaries and teachers were called upon. Today, it is a problem delegated to bureaucrats and lawyers. The "Indian problem" will persist despite all these efforts as long as we ignore, deny, or whitewash the past.

200. Rupert, *supra* note 20.

201. Ivins, "\$122 Million Award Faces Sioux With Complex Decisions, N.Y. Times, July 14, 1980, p. 1, col. 3. See also Deloria, *supra* note 97.

202. *Id.*

203. *Id.*

204. Oglala Sioux Tribe v. United States, No. Civ. 80-5-062 (W.D.S.D. filed Sept. 11, 1980).

205. Long Beach Press-Telegram, Jan. 19, 1982, p. A7, col. 1. The Oglala also sought to block payment of attorney's fees. The Court of Claims dismissed their objections on May 20, 1981, awarding attorneys' fees to Sioux counsel at the statutory maximum rate of ten percent. S. Taylor Jr., "3 Lawyers get \$10 Million In Winning Case for Indians," N.Y. Times, May 27, 1981, part A, at 12. See also *supra* note 20.